SUPREME COURT, U. S.
No. 316

AUG 7 1967

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

GENERAL MOTORS CORPORATION,
Petitioner,
v.
INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW),
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

## BRIEF FOR RESPONDENT IN OPPOSITION

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## BRIEF FOR RESPONDENT IN OPPOSITION

### QUESTION PRESENTED

Where contracting out permanently reduced the number of jobs in the bargaining unit by six, did the court below err in holding that the Company was not excused from bargaining on it, either because the effect was *de minimis*, or because the management clause, dealing only with methods changes, waived the Union's right to bargaining on contracting out?

## STATEMENT OF THE CASE

### The Facts

There was no dispute between the Board and the court of appeals as to the basic facts of this case, which are as follows.

Prior to June 17, 1963 finished cars assembled at the Company's Southgate, California plant were temporarily stored and then loaded for shipping in two distinct locations and in two series of operations, performed by two groups of employees—one employed by the Company and the other by an outside employer, PMT. The temporary storage operations were performed on the Company owned OK lot by the eighteen bargaining unit drivers in the Company's Department 66. The loading operations were performed by PMT employees on the PMT lot, which was immediately adjacent to the OK lot and leased to PMT by the Company. Finished cars were driven onto the OK lot and temporarily parked there by six of the Department 66 drivers. When enough cars for a load had thus been parked the remaining twelve drivers in Department 66 drove them to a gate in the fence that separated the OK and PMT lots. PMT employees called gatemen drove the cars through the fence and parked them together on the PMT lot. Other PMT employees called truck drivers and rail loaders then drove the cars onto haulaway trucks and rail cars on which they were transported to dealers in the Pacific coast area. (Appx C, pp. 28-29).[1]

On June 17, 1963 the Company consolidated the temporary storage and loading operations into one by leasing

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[1] Record references are all to the appendices included at the end of the Petition; i.e., "Appx A" refers to the court of appeals' decision, "Appx C" to the Board's supplemental decision, and "Appx D" to the Board's original decision. A reference included before the period for the sentence preceding it relates only to that sentence.

PMT the OK lot and removing the fence between the two lots, making them one, called the PMT lot. Finished cars are still driven out onto the lot and temporarily parked, but now they are driven directly from those parking spots straight onto the haulaway trucks and rail cars, rather than being parked a second time in preparation for loading, as before. (Appx C, pp. 29-30).

Under the new system all jobs are performed by PMT employees. The jobs of the twelve Department 66 drivers who drove the cars from the first parking spots to the gate have been eliminated, as have those of the PMT gatemen who drove the cars from the gate to the second parking spot, on the PMT lot. The jobs of driving the parked cars onto haulaways and rail cars are, of course, still performed and still by PMT employees. And the jobs of driving the cars out onto the lot and parking them are still performed, but no longer by the six Department 66 drivers who performed them in the past. These jobs are now performed by PMT gatemen. (Appx C, p. 30).

The Board characterized the transfer of this work to PMT as an "aspect" of the overall methods change (Appx C, p. 31). The Court of Appeals characterized it as contracting out (Appx A, p. 22).

The change of June 17 was preceded by a Company-Union meeting on June 12 at which the Company detailed what it was going to do on June 17. In response to the Union's protest, the Company replied that the management clause in the UAW-GM National Agreement gave it a contract right to do what it was going to do, so there was no point in discussing it (Appx D, pp. 38-39). Two days later, on June 14, the Union filed an unfair labor practice charge against the Company accusing it of violating Sections 8(a)(1) and (5) of the Labor Act by refusing to engage in collective bargaining on the proposed contracting out. On June 17 the Company put the change

into effect. On June 20, after four meetings on the subject, the parties agreed on placement and pay for the Department 66 drivers displaced by the change (Appx C, p. 33).

### The Decisions Below

In its Supplemental Decision the Board assumed that six bargaining unit jobs had been transferred to PMT; however, it refused to call the transfer contracting out and characterized it instead as an "aspect" of the methods change (Appx C, pp. 30-31, 32 n.8). The Board reasoned that, since the Company's conduct was not contracting out but merely an "aspect" of the methods change, and since the management clause of the parties' National Agreement provides that "the methods, processes and means of manufacturing are solely and exclusively the responsibility of the Corporation", the Company was authorized to engage in the methods change, including this "aspect", and the Union had waived its statutory right to collective bargaining on the matter. The Board was at pains to make clear that since it had not found contracting out, it was not ruling that the Union had waived its rights to bargaining on contracting out. (Appx C, pp. 27-28).

The Board cited two additional grounds for its decision. First, it concluded that the change "did not result in any significant detriment to the employees in the bargaining unit", noting that it did not appear that "there were any layoffs as a result of the change" (Appx C, pp. 31-32). Finally, the Board noted that the Union had neither requested that the Company delay its action nor suggested any alternatives, and that, after the change, the parties reached agreement on placement and pay for the displaced Department 66 drivers. It characterized this conduct as fulfilling "any claimed duty to bargain" the Company had. (Appx C, pp. 33-34).

The court of appeals ruled that the management clause in the parties' agreement was not a "clear and unmistakable" waiver by the Union of its statutory right to collective bargaining on the action the Company had taken. The court called that action contracting out, noting that, "It took away the jobs of six members of the Union" (Appx A, p. 22). The court concluded that the "agreement that 'the methods, processes and means of manufacturing are solely and exclusively the responsibility of the Corporation' is certainly not a 'clear and unmistakable' waiver of the union's right to bargain where a change in methods amounts in fact to contracting out." The court particularly noted *Fafnir Bearing Co.*, 151 NLRB 332 n. 1, 337, 341 (1965), in which the Board ruled that virtually identical management clause language was not a waiver of the union's right to bargaining on contracting out. The court added, "Neither is it 'clear and unmistakable' that 'the methods, processes and means of manufacturing' include parking manufactured cars." (Appx A, p. 23).

On the "significant detriment", or *de minimis*, point, the court ruled that "the change had an adverse impact on the bargaining unit since it diminished by six the whole number of jobs performed by its members. This was not a mere '*de minimis*' violation of the employer's duty to bargain with the union." (Appx A, p. 22). With respect to both the discussions which preceded the change and the subsequent agreement concerning placement and pay for the displaced Department 66 employees, the court rejected the Board's characterization of them as fulfilling the Company's duty to bargain on the contracting out.

In summary, the points of difference between the Board and the court were as to the following: (1) whether the management clause was a "clear and unmistakable waiver" of the Union's right to bargaining on the Company's action; (2) whether that action was contracting out, or an "aspect" of the methods change; (3) whether the loss of

six bargaining unit jobs was *de minimis;* and (4) whether the discussions preceding the change and the subsequent agreement on placement and pay for the displaced employees satisfied the company's duty to bargain on the decision to contract out?

In both its original and supplemental decisions the Board treated this as a contract waiver case (Appx D, p. 41; Appx C, pp. 27-28); that is, one in which the central question is whether the parties' contract contains a clear and unmistakable waiver by the union of bargaining on the employer's action. The Board ruled there was a waiver because the Company's action was a methods change. The court ruled there was not a waiver because the Company's action was contracting out. As it states in the memorandum filed in this Court, the Board regards this case as turning on its own facts and as having no "broad sweep".[2]

## ARGUMENT

### The Decision Below is Correct and Presents no Important Question of Federal Law.

The Company's main reason for requesting the writ is so that this Court can review "the issues in this case which were not resolved by the Court's *Fibreboard* decision." However, the Company merely lists four factual differences between this case and *Fibreboard Paper Products Corp. v. NLRB,* 379 U.S. 203, *affirming* 322 F. 2d 411 (D.C. Cir. 1963), and asks the Court to review this case because it is different from *Fibreboard.*[3] This, by itself,

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[2] Since the Board opposes review, we agree with its statement that it is a respondent before this Court. (See Board's Memorandum, p. 1, n.1).

[3] In stark contrast to the Company's now nearly total reliance on *Fibreboard* was its attitude toward that decision in the court of appeals. There it cited *Fibreboard* once in its supplemental brief and not even once in its principal brief.

is hardly reason for review. Moreover, as we shall demonstrate, the questions suggested by the factors the Company points to are either unimportant, were settled in *Fibreboard*, or have been settled in *NLRB v. C & C Plywood Corp.*, 385 U.S. 421.

First, the Company urges that in this case the collective bargaining agreement contains provisions (the management, transfer, and waiver clauses) which it contends waive the Union's statutory right to collective bargaining on contracting out. That the Company reads this particular agreement as including such a waiver while the court of appeals does not, hardly presents an important unsettled question of federal labor law, especially in view of (1) the Board's decision in *Fafnir Bearing Co.*, 151 NLRB 332 n.1, 337, 341 (1965), in which it read a management clause almost identical to the one involved here as *not* a waiver of the Union's right to bargaining on contracting out, and (2) *NLRB v. C & C Plywood Corp.*, 385 U.S. 421, 423 n.4, in which this Court affirmed the Board's ruling that a waiver clause virtually identical to the one here (waiving "the right . . . to bargain collectively with respect to any subject matter not . . . covered in this Agreement") did not waive the Union's right to bargaining on unilateral employer action not authorized by the contract.

Second, the Company points to the fact that in this case there were no layoffs or discharges.[4] But, six bargaining

[4] In a footnote the Company rather half-heartedly tenders an alleged conflict on this point with *Puerto Rico Telephone Co. v. NLRB*, 359 F. 2d 983 (1st Cir. 1966), and *District 50 United Mine Workers, Local 13942 v. NLRB*, 358 F. 2d 234 (4th Cir. 1966). But as the court below pointed out, those cases are not apposite for while there were no layoffs caused by the contracting out there, neither was there any reduction in the number of jobs in the bargaining units (Appx A, pp. 22-23).

Indeed, in *Puerto Rico Telephone, supra* at 988, the First Circuit indicated that *either* layoffs or a reduction in unit jobs triggers the bargaining duty:

> "In short, we cannot say . . . that the bargaining unit or any employee in it suffered a significant detriment or was otherwise adversely affected as a direct result of these two subcontracts."

unit employees, though they got similar jobs elsewhere in the plant, lost their parking lot driving jobs to PMT employees; and the total number of jobs in the bargaining unit available for unit employees was permanently diminished by six. In *Fibreboard, supra* at 215, this Court defined contracting out which is a mandatory subject for bargaining as: "the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment". While there were no layoffs in *Fibreboard,* the Court's reliance (379 U.S. at 212-13) on *Teamsters Local 24 v. Oliver,* 358 U.S. 283, and *Timken Roller Bearing Co.,* 70 NLRB 500 (1946), *enforcement denied on other grounds,* 161 F. 2d 949 (6th Cir. 1947), in neither of which were there layoffs, makes it plain that where unit jobs have been lost, immediate layoffs are not a *sine qua non* of the statutory duty to bargain on contracting out.

Third, the Company points to the fact that in two meetings in advance of the change the Company explained it to the Union and the Union neither requested a delay nor proposed alternatives, and to the fact that after the change the parties agreed on placement for the displaced Department 66 drivers. But the Company omits mentioning that at the second of the two pre-change meetings the Company insisted it had a contractual right to do what it was going to do, so there was no point in discussing it, and also fails to note that the agreement on placement for the Department 66 drivers was reached *after* the Union had filed its unfair labor practice charge protesting the Company's refusal to bargain on the contracting out decision (see pp. 3-4 *supra*). That the Company regards this conduct as satisfying its bargaining duty while the court of appeals does not hardly presents an important question of federal labor law.

Fourth, the Company asserts that the fundamental issue in this case is one on which the Union could have gone to arbitration, and implies that the Board erred, therefore, in examining the parties' contract—a suggestion it makes for the first time here. But the fundamental issue in this case was whether the management clause contains a clear and unmistakable waiver of the Union's statutory right to bargaining on what the Company had done—an issue the Board has always viewed as within its competenec. This Court recently approved that view in *NLRB v. C & C Plywood Corp., supra,* rejecting the same point now urged by petitioner here. Cf. *NLRB v. Acme Industrial Co.,* 385 U.S. 482.

Finally, the Company claims the court of appeals' reversal of the Board was in violation of the "substantial evidence" rule of *Universal Camera Corp. v. NLRB,* 340 U.S. 474. But the two questions involved—whether what the Company did was contracting out, and whether its "overall conduct" fulfilled its duty to bargain on the contracting out decision—are not questions of fact or conflicting evidence—they are questions of law for resolution on undisputed facts. *Universal Camera* thus has no application; and, indeed, its application would not aid the Company, for the Trial Examiner, who heard the evidence, found that the Company *did* contract out and did *not* satisfy its duty to bargain about it. Thus, even if it were assumed *arguendo* that the court of appeals reversed the Board on findings of fact, it would be evident that the court's rulings were based "on the record considered as a whole", including the Trial Examiner's decision, and therefore not in contravention of *Universal Camera, supra* at 492-97.

Moreover, as this Court said in *Universal Camera, supra* at 490: "Our power to review the correctness of application of the present standard ought seldom to be called into action."

## CONCLUSION

For the foregoing reasons respondent submits that the writ should not issue.

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